

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

John Barber

v.

Civil No. 14-cv-98-JL

Richard Gerry, Warden, New
Hampshire State Prison, et al.

REPORT AND RECOMMENDATION

John Barber brought this action, pursuant to 42 U.S.C. § 1983, against New Hampshire State Prison ("NHSP") Warden Richard Gerry and a former NHSP corrections officer, Brian Hill, in their individual capacities, alleging Eighth Amendment violations for failing to protect Barber from harm, and subjecting Barber to inhumane conditions of confinement at the NHSP Health Services Center ("HSC").¹ Before the court for a report and recommendation as to disposition is defendant Gerry's motion to dismiss (doc. no. 42) for failure to state a claim, filed pursuant to Fed. R. Civ. P. 12(b) (6). See LR 72.1.

¹Defendant Hill has been dismissed from this action by stipulation. See Doc. No. 57 (Stipulation of Dismissal); May 6, 2015, Order (approving Stipulation of Dismissal). The court has, in an Order issued this date, authorized service of the complaint (doc. no. 1) and complaint addendum (doc. no. 63) upon another NHSP corrections officer, David Biondi, in regard to the failure to protect claim.

Barber objects. See Doc. No. 46.

Background

On March 22, 2013, Barber was a maximum security inmate housed in NHSP's Secure Housing Unit ("SHU"). Barber alleges that on March 22, 2013, former corrections officer Brian Hill permitted another inmate to assault him. Following the assault, Barber notified a nurse at the HSC of the circumstances of the assault, and the matter was reported to NHSP officials. Based on the nature of the allegations, and the involvement of a corrections officer, Gerry ordered that Barber be housed in the HSC and placed in isolation for Barber's safety. Barber remained at the HSC until March 28, 2013, when he was transferred to another facility.

During Barber's six-day confinement in the HSC, he was allowed out of his isolation cell only twice, to shower, once for three minutes and once for ten minutes. Barber requested, but was denied, additional out-of-cell time, additional showers, clean clothes, toothpaste, a toothbrush, cleaning supplies to clean his cell, and a phone call to his family. In response to Barber's requests for these things, he was told that "medical isn't made for [maximum security] inmates" or "I'll see what I

can do" or "no." On March 28, 2013, Barber was transferred to the Rockingham County House of Corrections until the NHSP investigation into the March 22, 2013, assault was completed.

Discussion

I. Motion to Dismiss Standard

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b) (6), the court must consider whether the factual content in the complaint and inferences reasonably drawn therefrom, taken as true, state a claim to relief. Hernandez-Cuevas v. Taylor, 723 F.3d 91, 102-03 (1st Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In doing so, the court disregards any legal conclusions in the complaint. Hernandez-Cuevas, 723 F.3d at 102-03. The court is generally limited to considering "'facts and documents that are part of or incorporated into the complaint,'" as well as "'documents incorporated by reference in [the complaint], matters of public record, and other matters susceptible to judicial notice.'" Giragosian v. Ryan, 547 F.3d 59, 65 (1st Cir. 2008) (citations omitted). As Barber is proceeding pro se in this action, the court must construe his pleadings liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007).

II. Conditions of Confinement

"The Eighth Amendment prohibits prison officials from depriving inmates of 'the minimal civilized measure of life's necessities.'" Brown v. Plata, 131 S. Ct. 1910, 1959 (2011) (quoting Rhodes v. Chapman, 452 U.S. 337, 347). Barber claims that Gerry's order that he be housed in HSC in an isolation cell for six days, and the denial of out-of-cell time, showers, clean clothes, toothpaste, a toothbrush, cleaning supplies, and a phone call to his family, violated the Eighth Amendment.

An Eighth Amendment inhumane conditions of confinement claim has an objective and subjective component. Wilson v. Seiter, 501 U.S. 294, 298 (1991). To satisfy the objective component of an inhumane prison conditions claim, the deprivations alleged must be "extreme." Hudson v. McMillian, 503 U.S. 1, 9 (1992). The duration of allegedly unconstitutional conditions of confinement "may affect the Eighth Amendment calculus." Suprenant v. Rivas, 424 F.3d 5, 20 (1st Cir. 2005) (citing Hutto v. Finney, 437 U.S. 678, 687 (1978) (unpleasant conditions of confinement "might be tolerable for a few days and intolerably cruel for weeks and months.")).

The subjective component of an Eighth Amendment claim requires the plaintiff to demonstrate that the prison officials acted with deliberate indifference to the plaintiff's health or safety. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson, 501 U.S. at 298-99. "[T]he official involved must have had a 'sufficiently culpable state of mind,' described as 'deliberate indifference' to inmate health or safety." Giroux v. Somerset Cty., 178 F.3d 28, 32 (1st Cir. 1999) (citations omitted). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.'" Id. (quoting Farmer, 511 U.S. at 834).

A. Objective Component

Barber was deprived of out-of-cell time, showers, a change of clothing, a toothbrush and toothpaste, cell cleaning supplies, and a telephone call to his family for six days while housed in the HSC, prior to his transfer out of the NHSP. Barber does not allege that he suffered any harm, or that he was subject to any risk of serious harm as a result of these deprivations. The six-day deprivations alleged are not, as a

matter of law, of sufficient seriousness or duration to satisfy the objective component of the Eighth Amendment test. See Fantone v. Herbick, 528 F. App'x 123, 127 (3d Cir. 2013) (denial of telephone privileges, outdoor exercise, and a razor, for forty-six days, does not amount to cruel and unusual punishment); Richmond v. Settles, 450 F. App'x 448, 455 (6th Cir. 2011) (six days without a shower and personal hygiene items not actionable (citation omitted)); Brown v. Lamanna, 304 F. App'x 206, 207 (4th Cir. 2008) ("With regard to lack of recreation, an inmate must show specific harm resulting from the deprivation and a complete denial for an extended period of time."); Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001) (denial of yard privileges for up to ninety days at a time is not cruel and unusual punishment); Hightower v. Vose, 95 F.3d 1146, 1996 WL 516123, at *2, 1996 U.S. App. LEXIS 24041, at *6 (1st Cir. 1996) (unpublished table decision) (denial of shower for eight days is a de minimis imposition that does not implicate constitutional concerns); Knight v. Armontrout, 878 F.2d 1093, 1095-96 (8th Cir. 1989) (thirteen days without recreation does not violate the Eighth Amendment); Oliver v. Dep't of Corrs., No. 3:13CV-P820-H, 2014 U.S. Dist. LEXIS 10627,

at *11 (W.D. Ky. Jan. 29, 2014) (denial of change of clothing for nine days does not constitute Eighth Amendment violation); Cole v. Thyng, No. 11-cv-018-JL, 2011 U.S. Dist. LEXIS 139159, at *25-26 (D.N.H. Nov. 8, 2011) (short-term deprivation of out-of-cell time does not violate the Eighth Amendment), report and recommendation adopted, 2011 U.S. Dist. LEXIS 139099, at *1 (D.N.H. Dec. 2, 2011); Johnson v. Poulin, No. 07-cv-161-PB, 2008 U.S. Dist. LEXIS 9254, at *23-24 (D.N.H. Apr. 24, 2008) (deprivation of personal hygiene items for ten days did not constitute cruel and unusual punishment), aff'd on other grounds, Johnson v. Thyng, 369 F. App'x 144, 149 (1st Cir. 2010); Dolberry v. Levine, 567 F. Supp. 2d 413, 417 (W.D.N.Y. 2008) (denial of showers and cleaning supplies for several weeks did not give rise to a constitutional violation).

Barber has failed to state sufficient facts to satisfy the objective component of an Eighth Amendment claim in regard to the conditions of his confinement in the HSC. The conditions of confinement claim is subject to dismissal on that basis.

B. Subjective Component

Even if Barber could allege that the conditions in the HSC presented a significant risk to his health and safety, Barber

has failed to state facts demonstrating that Gerry was aware of any of the specific deprivations of which Barber complains, and failed to take steps to address those deprivations. To the contrary, Gerry responded to the risk to Barber's safety in SHU by placing him to the HSC, where he would be safe. While Barber has alleged that Gerry knew that the HSC was not equipped to house maximum security inmates, an allegation regarding that knowledge, *per se*, does not show or give rise to a reasonable inference that Gerry knew that conditions in the HSC would present a substantial risk of serious harm to Barber for the duration of his temporary stay. Accordingly, Barber's pleadings do not state an Eighth Amendment claim with respect to the conditions of Barber's confinement in the HSC, and for that reason, Gerry's motion to dismiss (doc. no. 42) should be granted, to the extent it seeks dismissal of that conditions of confinement claim.

III. Failure to Protect

A separate Report and Recommendation ("R&R") issued on this date recommends dismissal of Barber's failure to protect claim, pursuant to 28 U.S.C. § 1915A(a), to the extent it is asserted against defendant Gerry. The same reasons asserted in that R&R

for dismissing the failure to protect claim as to Gerry are incorporated herein by reference. The district judge, for those reasons, should grant Gerry's motion to dismiss the failure to protect claim asserted against him.

Conclusion

For the foregoing reasons, the district judge should grant defendant Gerry's motion to dismiss (doc. no. 42), and defendant Gerry should be dropped from this action. Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010).



Andrea K. Johnstone
United States Magistrate Judge

July 16, 2015

cc: John Barber, pro se
Brian Hill, pro se
Francis Charles Fredericks, Esq.